

CHAPTER 23-17.5 HEALTH CARE PROVIDER COOPERATIVE AGREEMENTS

23-17.5-01. Definitions.

In this chapter, unless the context otherwise requires:

1. "Active supervision" means actual state direction, supervision, or control that results in the exercise of power by the department or the attorney general to review anticompetitive conduct that results from, or is authorized by, a cooperative agreement for which a certificate of public advantage has been issued pursuant to this chapter. The term includes the authority granted the department or attorney general by this chapter to terminate or cancel a certificate of public advantage or to investigate or enjoin a cooperative agreement, and other conditions to the certificate provided under section 23-17.5-03.1.
2. "Cooperative agreement" means:
 - a. An agreement among two or more health care providers or third-party payers for the sharing, allocation, or referral of patients, personnel, instructional programs, support services and facilities, or medical, diagnostic, or laboratory facilities or procedures or other services traditionally offered by health care providers; or
 - b. An agreement among two or more health care providers for acquisition of control, consolidation, merger, or sale of assets of those health care providers.
3. "Department" means the state department of health.
4. "Health care provider" means any person who delivers, administers, or supervises health care products or services, for profit or otherwise, in the ordinary course of business or professional practice.
5. "Third-party payer" means any insurer or other entity responsible for providing payment for health care services, including workforce safety and insurance, the comprehensive health association of North Dakota, and any self-insured entity.

23-17.5-02. Discussions or negotiations - Certificate of public advantage.

A health care provider may discuss preliminary matters toward, or may negotiate, a cooperative agreement with another health care provider or third-party payer if the likely benefits to health care consumers which may result from the agreement outweigh the disadvantages attributable to a potential reduction in competition that may result from the agreement. The parties to a cooperative agreement may apply to the department for a certificate of public advantage governing the agreement. Although a health care provider or third-party payer is not required to apply for a certificate of public advantage, a party that does not apply for a certificate does not receive the exclusion from state antitrust enforcement and intended federal antitrust immunity provided by section 23-17.5-10. The application must include an executed copy of the cooperative agreement and must describe the nature and scope of the cooperation in the agreement and any consideration passing to any party under the agreement. The applicants shall file a copy of the application and related materials with the attorney general and the department. The department shall review the application and shall hold a public hearing on the application. The department shall grant or deny the application within ninety days of the date of filing of the application. The decision must be in writing and must set forth the basis for the decision. The department shall furnish a copy of the decision to the applicants, the attorney general, and any intervenor.

23-17.5-03. Standards for certification.

The department shall issue a certificate of public advantage for cooperative agreement if the department determines that the applicants have demonstrated by clear and convincing evidence that the likely benefits to health care consumers which may result from the agreement outweigh the disadvantages attributable to a potential reduction in competition that may result from the agreement. The department shall consult with the attorney general regarding its evaluation of a potential reduction in competition which may result from a cooperative agreement.

1. In evaluating the likely benefits of a cooperative agreement to health care consumers, the department shall consider whether any of the following benefits may result from the cooperative agreement:
 - a. Enhancement of the quality of health care services provided to residents of this state;
 - b. Preservation of health care facilities or services in geographical proximity to the communities traditionally served by those facilities or services;
 - c. Gains in the cost efficiency of services provided by the parties involved;
 - d. Improvements in the utilization of health care resources and equipment;
 - e. Avoidance of duplication of health care resources; and
 - f. Enhancement of the ability to cooperatively provide services to underserved or low-income patients.
2. The department's evaluation of the disadvantages attributable to a potential reduction in competition which may result from the agreement may include the following factors:
 - a. The extent of any likely adverse impact on the bargaining power of health maintenance organizations, preferred provider organizations, managed health care service agents, or other health care payers in negotiating payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;
 - b. The extent of any reduction in competition among physicians, allied health professionals, other health care providers, or persons furnishing goods or services to or in competition with providers or third-party payers that is likely to result directly or indirectly from the cooperative agreement;
 - c. The extent of any likely adverse impact on patients in the quality, availability, and price of health care services; and
 - d. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of likely benefits to health care consumers over disadvantages attributable to a potential reduction in competition which may result from the agreement.

23-17.5-03.1. Active supervision.

The decision granting an application for a certificate of public advantage must include conditions for active supervision. The active supervision must be sufficient for the department to determine periodically whether circumstances may be present to meet the criteria for certificate termination pursuant to section 23-17.5-04 and must otherwise be structured to provide a reasonable basis for state action immunity from federal antitrust laws as interpreted by applicable laws, judicial decisions, opinions of the attorney general, and statements of antitrust enforcement policy issued by the United States department of justice and the federal trade commission. The conditions for active supervision, except the authority granted the department or attorney general by this chapter, may be modified or terminated by agreement between the parties to the cooperative agreement and the department.

23-17.5-04. Certificate termination.

The department may, after notice and hearing, terminate a certificate of public advantage if the department determines that:

1. The likely or actual benefits to health care consumers that result, or may result, from the certified agreement no longer outweigh the disadvantages attributable to a potential or actual reduction in competition which results, or may result, from the agreement; or
2. Performance by the parties under the certified agreement does not conform to the representations made by the parties in the application or to the provisions of any conditions attached to the certificate of public advantage by the department at the time the application was granted.

23-17.5-05. Records.

The department shall maintain all cooperative agreements for which the certificates of public advantage remain in effect. Any party to a cooperative agreement who terminates the agreement shall file a notice of termination with the department within thirty days after termination.

23-17.5-06. Investigation by attorney general.

The attorney general, at any time after an application is filed under section 23-17.5-02, may require by subpoena the attendance and testimony of witnesses and the production of documents in the county in which the applicants are located for the purpose of investigating whether the cooperative agreement satisfies the standards set forth in section 23-17.5-03. The attorney general may seek an order from the district court compelling compliance with a subpoena issued under this section.

23-17.5-07. Cooperative agreement enjoined - Automatic stay - Standards for adjudication.

The attorney general may seek to enjoin the operation of a cooperative agreement for which an application for certificate of public advantage has been filed by filing suit against the parties to the cooperative agreement in district court. The attorney general may file an action before or after the department acts on the application for a certificate, but the action must be brought no later than forty days following the department's approval of an application for certificate of public advantage. Upon the filing of the complaint, the department's certification, if previously issued, must be stayed and the cooperative agreement is of no further force unless the court orders otherwise or until the action is concluded. The attorney general may apply to the court for ancillary temporary or preliminary relief necessary to stay the cooperative agreement pending final disposition of the case. In any action, the applicants for a certificate bear the burden of establishing by clear and convincing evidence that the likely benefits to health care consumers which may result from the cooperative agreement outweigh the disadvantages attributable to a potential reduction in competition which may result from the agreement. The court shall review whether the agreement constitutes an unreasonable restraint of trade under state or federal law in assessing the disadvantages attributable to a potential reduction in competition which may result from the agreement.

23-17.5-08. Cancellation of a certificate of public advantage.

If, at any time following the forty-day period specified in section 23-17.5-07, the attorney general determines that, as a result of changed circumstances, the benefits to health care consumers which result from a certified agreement no longer outweigh the disadvantages attributable to a reduction in competition resulting from the agreement, the attorney general may file suit in district court seeking to cancel the certificate of public advantage. In an action brought under this section, the attorney general has the burden of establishing by a preponderance of the evidence that, as a result of changed circumstances, the likely or actual benefits to health care consumers which result, or may result, from the agreement and the unavoidable costs of canceling the agreement are outweighed by the disadvantages attributable to a potential or actual reduction in competition which results, or may result, from the agreement. If the attorney general first establishes by a preponderance of the evidence that the department's certification was obtained as a result of material misrepresentation to the department or the attorney general as the result of coercion, threats, or intimidation toward any party to the cooperative agreement, the parties to the agreement bear the burden of establishing by clear and convincing evidence that the likely or actual benefits to health care consumers which result, or may result, from the agreement and the unavoidable costs of canceling the agreement are outweighed by the disadvantages attributable to a potential or actual reduction in competition which results, or may result, from the agreement.

23-17.5-09. Resolution by consent decree - Attorney's fees.

The district court may resolve any action brought by the attorney general under section 23-17.5-07 or 23-17.5-08 by entering an order that, with the consent of the parties, modifies the cooperative agreement. Upon the entry of the order, the parties to the cooperative agreement have the protection specified in section 23-17.5-10 and the cooperative agreement has the effectiveness specified in section 23-17.5-10. If the attorney general prevails in an action under section 23-17.5-06, 23-17.5-07, or 23-17.5-08, the attorney general is entitled to an award of the reasonable costs of the investigation or litigation and reasonable attorney's fees, expert witness fees, and court costs incurred in litigation.

23-17.5-10. Exclusion from state antitrust enforcement - Federal antitrust immunity intended - Application.

A health care provider or third-party payer who participates in the discussion or negotiation of a cooperative agreement for which an application is filed is engaged in conduct for which no action may be brought pursuant to chapter 51-08.1 for penalties, damages, injunctive enforcement, or other remedies. A health care provider or third-party payer who participates in the implementation of a cooperative agreement, for which a certificate of public advantage was issued, is engaged in conduct for which no action may be brought pursuant to chapter 51-08.1 for penalties, damages, injunctive enforcement, or other remedies. The intent of this section is that the conduct be provided state action immunity from federal antitrust laws. This exclusion from state antitrust enforcement and intended federal antitrust immunity applies unless the discussion or negotiation exceeds the scope of a cooperative agreement as authorized by this chapter or the implementation exceeds the scope of the cooperative agreement for which a certificate of public advantage was issued. This section does not exempt hospitals or other health care providers from compliance with laws governing hospital cost reimbursement.

23-17.5-11. Assessment - Health care cooperative agreement fund.

The department shall establish an assessment to be paid by each party to a cooperative agreement. The aggregate amount of the assessment for a cooperative agreement may not exceed forty thousand dollars, unless the department determines that an extraordinary need exists for an additional amount to ensure effective evaluation of the application or supervision under section 23-17.5-03.1. The parties may require that the determination of the need for an additional amount is subject to approval by the state health council. An appeal may be taken under chapter 28-32 from a determination of the health council. After consultation with the parties, the department may require the payment of the assessment on an incremental basis and may require separate payments for the process of evaluating the application or for the process of active supervision. The assessment may be modified by agreement between the department and the parties to the cooperative agreement. The department shall deposit the moneys received under this section in the health care cooperative agreement fund of the state treasury.

23-17.5-12. Health care cooperative agreement fund - Appropriation.

The funds in the health care cooperative agreement fund are available to the state department of health, subject to legislative appropriation, for evaluation and active supervision of cooperative agreements among health care providers or third-party payers and for reimbursement to the attorney general for expenses incurred pursuant to this chapter. Any amounts reimbursed to the attorney general under this section are hereby appropriated.